IN THE MATTER of The Ontario Human Rights Code

and

IN THE MATTER of a complaint made by Miss Deborah Clarke that she was denied employment at the Camelot Steak House & Tavern, Toronto, Ontario, because of race and colour.

A Board of Inquiry was convened to hear the above matter, and hearings took place, on April 22nd and May 31st, 1971. Mr. J. Sopinka appeared on behalf of the Ontario Human Rights Commission and Mr. B. J. MacKinnon, Q.C. appeared for the Camelot Steak House & Tavern. The hearing was a lengthy one, as indicated by an official transcript of more than 350 pages. The testimony given by the parties and the other witnesses was conflicting throughout and, indeed, in almost every material particular. And where there was not an actual conflict there was a great deal of confusion or lack of detail on several key points. Much of this confusion is understandable. After all, the hearings took place several months following the events in question and witnesses had to recollect facts and details, now critical, which did not appear to have any particular significance or importance when they occurred. It is also apparent from the transcript that on several occasions conversations were at cross purposes and statements concealed misunderstandings between the persons concerned. The entire tangled skein of events will never be satisfactorily unraveled.

The crucial period with which we are concerned was December 7th to December 15th, 1970. There is at least no dispute that on December 7th Miss Clarke appeared at the Camelot Steak House & Tavern for a job interview

and that on December 15th she lodged a complaint with The Ontario Human Rights Commission alleging that she was denied employment by reason of race and colour. It is convenient at this point to set out in full the text of the complaint, which reads as follows:

> "In answer to an advertisement in the Toronto Daily Star for a cocktail waitress on Monday, December 7th, 1970, I phoned the number appearing in the advertisement (488-3397) and was invited to come to the Club's premises to submit an application.
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> When I arrived, the Manager, Mr. George Marcos, told me most of the part time vacancies were already filled but he would consider me for a full time position. Two days later I was telephoned and informed that all the positions were filled. However, the said advertisement continued to appear daily in the newspaper from December 7 - 14, 1970. On each day the ad appeared I phoned the Club and was advised that vacancies existed for part time and full time waitresses. On each occasion I was invited to present myself for an interview for one of the available positions.
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> I am a black Canadian and complain that I have been denied employment by this Club because of my race and colour, an act which I understand contravenes Section 4 of The Ontario Human Rights Code."

The Camelot Steak House & Tavern, hereinafter referred to as Camelot, is, as the name implies, a restaurant serving food and liquor. It is owned by a company known as Markee Restaurants Limited. Mr. James Marcou is President of the company and for all practical purposes may be considered as the owner of the restaurant and the person responsible for its operation and management. Mr. George Marcos, named in the complaint as Manager, was actually a maitre d', or sub-manager, employed by Mr. Marcou. At the time in question his duties included certain

responsibilities respecting the interviewing and hiring of applicants for positions as waitresses.

With the busy Christmas season approaching Mr. Marcou was anxious to have a sufficient staff of waitresses and to that end, in the first two weeks of December, he had caused three advertisements to be placed in the "Help Wanted" columns of the Toronto Daily Star. The first advertisement appeared December 2nd - 5th, inclusive, and read:

"WAITRESSES, experienced, for nights or part time."

A second advertisement, virtually identical to the first, appeared in the paper from December 8th - 14th, inclusive. Finally, on December 11th, 12th and 14th, an advertisement was placed which read:

"WAITRESS, cocktail, must be attractive, Camelot Tavern, 12 noon to 6".

On Monday, December 7th, Miss Clarke read the advertisement for "night or part time" waitresses, presumably from a copy of the December 5th edition of the Toronto Daily Star. She phoned the Camelot, was informed that waitress positions were still available, and that she should come for an interview immediately. She did so, accompanied by a friend, and was interviewed by Mr. George Marcos in the early evening of the same day. Miss Clarke, who had twelve years experience as a cocktail and food waitress, had been almost desperately, and futilely, looking for a job since the previous September. Feeling, understandably, that her lack of success in obtaining employment might be attributed to racial discrimination, she pointedly asked

Mr. Marcos, in the course of their conversation, whether the Camelot had any policy about not hiring black waitresses. Mr. Marcos vehemently denied that such was the case and seemed indignant that the suggestion should even be made.

From this point on, however, the evidence as to what was said and done on this and other occasions becomes extremely contradictory. At this juncture, it is perhaps simply sufficient to say that Miss Clarke was not offered a position on the evening of December 7th but that, on Miss Clarke's insistence, Mr. Marcos agreed to phone her at her home address and let her know whether she did or did not have a job. In this latter respect, in the course of the interview, Miss Clarke had filled out an application form to work as a "cocktail waitress". Thereafter, the following dates and events appear to be the most salient. Two days after the initial interview, on the evening of December 9th, Mr. Marcos made the promised phone call. Miss Clarke was not in at the time and the landlady answered the phone. According to Miss Clarke, on her return, she found a note from the landlady stating that the Camelot had called and that there were no jobs available. In the days that followed Miss Clarke noticed that the advertisements were still running in the paper and confirmed that waitress positions were still available at the Camelot by phoning the restaurant on several occasions, without identifying herself, and being assured that there were openings and that she should come up and apply. Satisfied in her own mind that she was

being discriminated against, Miss Clarke phoned Mr. Marcos directly on Monday, December 14th, identified herself, and demanded to know why the advertisements were still running and why she did not have the offer of a job. There may have been a similar conversation with Mr. Marcos previously, on December 11th. In any case, if there were two conversations, they were both angry and argumentative. Certainly, it is clear from the testimony of both Mr. Marcos and Miss Clarke that the conversation on December 14th was heated to say the least. Following that conversation Miss Clarke went to the offices of The Ontario Human Rights Commission and formally filed the complaint as previously set out.

Before proceeding to an attempt at fleshing out the bare skeletal bones outlined above, and filling in the background as much as possible considering the welter of conflicting and diametrically opposing evidence, it may be appropriate at this time to deal with a preliminary submission made by Mr. MacKinnon, representing the Camelot Restaurant and Mr. James Marcou, that the hearing be conducted in camera.

It is, of course, trite to say that a Board of Inquiry constituted under The Ontario Human Rights Code is not a trial, much less a prosecution. All that the Board is empowered to do is to make recommendations, or make no recommendations at all. Nevertheless it is also true that a complaint or allegation of racial discrimination carries a moral obloquy which is more serious than a great many charges of criminal offences and an investigation

under the Ontario Human Rights Code is only too likely to convey the impression that the person against whom the complaint is made is being tried as an accused. This wrong impression is given further credibility by the formal trappings and procedures which necessarily surround such an investigation. Thus the hearings are generally held in court rooms and court houses, legal counsel are employed, witnesses are subpoenaed and testify under oath in an adversary atmosphere of examination, cross examination and re-examination, court reporters are present, etc. In short, in the public mind, appearances are very much against a respondent and unfounded allegations and testimony may cause very considerable damage to him, particularly if the allegations relate to a business or enterprise depending upon public good will and acceptance. Of course, because an investigation under the Human Rights Code is not a trial, whatever the appearances, the respondent does not have the rights and defences which are the concomitants of a trial.

I hope the foregoing does some measure of justice to the representations made by Mr. MacKinnon and his argument, in essence, that because it is the publicity attendant upon a hearing of a Board of Inquiry under the Human Rights Code which creates the false and misleading impression that the respondent is an accused person on trial (but without the rights of an accused on trial) that therefore the general rule should be that such hearings should be held in camera and only in exceptional cases should they be conducted in public.

From the point of view of a respondent I can sympathize with this argument, and it is an argument which can be validly addressed to the Legislature. However it is also of fundamental importance that hearings of allegations of racial discrimination, and other equally cruel and invidious forms of discrimination, as contemplated by the Human Rights Code, be open to public scrutiny. This has a salutary effect upon complainants and respondents alike. In addition, those in our midst who are subject to discrimination, because they are "different", are the most vulnerable and the most suspicious. It is vitally important that the public and the individual complainant see and appreciate that fairness and justice is objectively sought. And this is not achieved behind closed doors. It has been rightfully said that

> "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." (Ambard v. Attorney General for Trinidad and Tobago, [1936] A.C. 322, 335.)

The selfsame argument raised by Mr. MacKinnon was previously raised in the Ontario Court of Appeal in the case of Regina v. Tarnopolsky, Ex parte Bell, 11 D.L.R. (3d) 658. Speaking for the Court, Laskin, J.A., as he then was, stated the following:

> "Nor can effect be given to [the] contention ... there was no warrant in the Code for a public inquiry. It is unnecessary to lay down specific rules on whether or when a board of inquiry should proceed in public. If there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them in camera."

The decision of the Court of Appeal was reversed by the Supreme Court

of Canada on other grounds but the statement was not affected by the decision of the Supreme Court. More specifically, in his monumental Inquiry into Civil Rights, The Honourable Mr. J. C. McRuer reached the same conclusion, and limited any exceptions in the following terms:

> "Provisions should be made that hearings should be held in public except where:
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> (a) public security is involved;
> (b) intimate financial or personal circumstances may have to be disclosed;
> (c) hearings are by self-governing professional bodies involving professional capacity and reputation.
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> Where discretion is to be vested in certain tribunals to hold closed hearings in special circumstances, such should be provided in the statute conferring the power." (Royal Commission Inquiry into Civil Rights, Report 1, Volume 1, page 214)

At the hearing I adopted these statements of Mr. Justice Laskin and The Honourable Mr. McRuer and accordingly I dismissed Mr. MacKinnon's application that the proceedings be held in camera.

It is appropriate, also, to discuss one further matter at this point, that is, the onus or burden of proof upon the complainant. Clearly the onus does not require proof beyond a reasonable doubt, which is only appropriate to criminal prosecutions and, to repeat, investigation by boards of inquiry under the Human Rights Code are in no sense whatsoever a criminal prosecution. Accordingly the ordinary civil standard of "preponderance of probability" applies. In other words, an adverse finding against the respondent in the present case only requires that I, as Chairman, be satisfied

that the conclusion of racial discrimination is the most probable of the possible views of the facts. Put another way I must be satisfied that the most probable reason why Miss Clarke did not obtain a position with the respondent was because she was black. But what is meant by being "satisfied" and in what context are "probabilities" assessed, or is such assessment a purely abstract or mechanical exercise? These questions have been dealt with at length in several cases but two relatively recent Supreme Court of Canada decisions are, I believe, most helpful and indicative.

In Smith v. Smith and Smedman [1952] 2 S. C. R. 312, Cartwright J. had this to say:

> "...before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding."

Cartwright J. then quotes with approval an excerpt from a judgment of Dixon J., in Briginshaw v. Briginshaw, 60 C. L. R. 336, as follows:

> "Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect

> inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."

In Boykowych and Gadzalia v. Boykowych, [1955] S.C.R. 154, Rand J. spoke in similar vein:

> "But to say that the degree of social consequence does not indirectly reflect the quality and characteristics of the act given it by these factors and thus influence the degree of proof we demand for decision seems to me to contradict our daily experience ..."

From the foregoing it is clear that the degree of persuasion or of being "reasonably satisfied" varies with the nature and consequence of the fact or facts to be proved and that where an act alleged is reprehensible or morally opprobrious, so that its proof would rightly subject a person to the contempt of all right minded citizens, and perhaps the destruction of his livelihood, then the proof of such conduct will not be lightly found and any such finding should not be produced by "inexact proofs, indefinite testimony, or indirect inferences". These considerations apply uniquely to this hearing, to the allegations of Miss Clarke and to the gravity of the consequences faced by the respondent.

Now to return to the facts and circumstances surrounding the complaint of Miss Clarke that she was denied employment in the Camelot Restaurant by reason of her race and colour. It was common ground throughout the hearing that Mr. James Marcou was not personally involved at any time with

Miss Clarke and, indeed, was quite unaware of her existence before December 15th when her complaint was formally filed. The complaint itself alleges discrimination on the part of Mr. George Marcos, the maitre d' or sub-manager, who conducted the interview with Miss Clarke, and who subsequently spoke to her on the phone at least once in the days that followed. Whether Mr. Marcou, or Markee Restaurants Limited, is vicariously responsible for any discriminatory conduct, if proved, on the part of Mr. Marcos, is another question and only arises if discrimination on his part has been satisfactorily established.

It would be unproductive to review all of the very considerable amount of testimony in this report or to state in detail the basis for certain findings of fact which I have made.

The first crucial date is December 7th, 1970, when, in response to an ad in the newspaper and on the invitation of a spokesman for the Camelot (presumably the bartender), Miss Clarke was interviewed for a waitress job by Mr. George Marcos. In fact, in the application form which she made out during the interview, Miss Clarke specifically applied for a position as a cocktail waitress although, as will be seen, other waitress jobs in the establishment were also discussed by Mr. Marcos and Miss Clarke. From the evidence it would appear that waitress jobs at the Camelot were of four types or classes. First there were what I will term luncheon waitresses who were employed, generally, from noon until 3 o'clock, or thereabouts, who served food (and liquor as incidental

to meal orders). Normally there would be thirteen or fourteen girls acting as luncheon waitresses. In addition there was a daytime cocktail waitress, employed from 11:00 a.m. to 6:00 p.m., who assisted in the service of food until 2:00 p.m. but thereafter served drinks exclusively. These had their counterparts in the evening, that is, night waitresses serving evening meals (and drinks incidental thereto), varying from 5 - 8 in number, and an evening cocktail waitress, employed from 6:00 p.m. till 1:00 a.m. the following morning, and who served drinks exclusively. The reference in the newspaper advertisements to "part time" waitresses referred to the luncheon waitresses and the reference to "night" waitresses meant those serving food in the dining room throughout the evening. On December 7th, and thereafter throughout the relevant period of December 7th - 14th, the Camelot required food waitresses in both categories, that is, at lunch time and in the evenings. Also throughout this time span, although the advertisement didn't actually appear until December 11th, the Camelot was interested in and obtaining applications for a noon to 6:00 p.m. cocktail waitress in substitution for the girl who was currently performing that job. These then were the waitress positions open which Miss Clarke did not obtain and the question is whether she failed to obtain one or other of these alternative jobs by reason of discrimination grounded on race or colour. After long and rather tortuous readings and re-readings of the transcript, I am not reasonably satisfied that such was the case and I cannot find affirmatively that discrimination was practiced by Mr. George Marcos. Critical to this

conclusion is the testimony of Miss Clarke which appears at page 284, and following pages, in the transcript. This testimony relates to the interview of December 7th.

In that testimony Miss Clarke admits that she discussed with Marcos the fact that she was attending Community College in the daytime and that obviously, and it was made clear, she could not work at the restaurant during the day. This effectively excluded consideration of any existing jobs as a luncheon waitress or for the prospective position of a noon to 6:00 p.m. cocktail waitress. There never was any vacancy for the position of evening cocktail waitress. Miss Clarke, during the course of this interview, also stated to Mr. Marcos that she would "prefer not to work handling food" and that she "preferred to handle liquor only" (see transcript pages 284, 290 for example). The interview was short, fifteen to twenty minutes in length, and this statement could easily be construed or interpreted as meaning that Miss Clarke did not want to handle food, that is, did not want a job as a night waitress which was the only remaining available position that would suit her schedule. Therefore, when, and I find that he did, Marcos called Miss Clarke's lodgings and told the landlady that no jobs were available he was telling the truth as far as Miss Clarke was concerned, if he believed that she did not want to work as a night waitress. He was not saying that there were no jobs available at the Camelot Restaurant. Of course there were, and the continuing advertisements attest to the fact that luncheon and night food waitresses were rather urgently required. Employment records tendered in evidence show that

girls were being hired during this period and thereafter as luncheon and night waitresses. In short, the position taken by the respondent is not that jobs were available to Miss Clarke, and she was refused them or other girls were hired in preference, but rather that Miss Clarke had excluded herself from the only jobs that were available or, mistakenly or otherwise, so Mr. Marcos thought.

It is true that a statement "I would prefer not to work handling food", is not the same thing as saying "I refuse to work handling food" and in the acrimonious conversation which Miss Clarke had with Mr. Marcos on December 14th, she testifies that she told Marcos that she would take any job that was available. As I have previously stated it is my view that there were food waitress positions vacant at this time, that is on December 14th. Nevertheless Miss Clarke was not offered any position whereupon she said "To hell with it" and went to the Human Rights Commission. But was she turned down, or not offered a position, on this last occasion because she was black or because, quite simply, the telephone conversation created or disclosed a personal animus between the two, quite apart from any element of race or colour, which made a satisfactory working relationship between the two unlikely.

In summary, then, it is quite tenable that when Miss Clarke was first informed that no jobs were available to her, via the phone call from Marcos to her landlady, that such was based upon job restrictions set by Miss Clarke herself in the initial interview, and from a misunderstanding

arising from her stated reluctance to handle food, and that when such misunderstanding was eventually cleared up in a subsequent telephone call, heat and passion, and not racial discrimination, put an end to any further thought of employment.

I am not saying that the foregoing was what actua.ly did happen but neither am I persuaded that racial discrimination was the underlying reason for Miss Clarke not obtaining a job at the Camelot. In a case such as this, to repeat the words of Dixon J. quoted earlier, I must be reasonably satisfied and "reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences". The evidence and testimony in this case can be fairly said to be permeated with these negative characteristics.

It follows from what I have said that a breach of the Ontario Human Rights Code has not, in my opinion, been satisfactorily established.

All of which is respectfully submitted.

Dated at London, Ontario, this 23rd day of September, 1971.

R. S. Mackay